MASSACHUSETTS GENERAL HOSPITAL
PSYCHIATRY ACADEMY

Law & Psychiatry: Practical Guidelines for Clinical Practice

THURSDAY, OCTOBER 22, 2020

44TH ANNUAL PSYCHOPHARMACOLOGY CONFERENCE

LIVE STREAM CONFERENCE

THURSDAY – SUNDAY, OCTOBER 22-25, 2020

PRESENTED BY

MASSACHUSETTS GENERAL HOSPITAL

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Law & Psychiatry: Practical Guidelines for Clinical Practice

PROGRAM AGENDA

THURSDAY, OCTOBER 22, 2020

4:00 – 4:10 PM	**Welcome & Introductions**
4:10 – 4:20 PM	**Legal & Regulatory Systems for Psychiatrists** Matthew Lahaie, MD, JD
4:20 – 4:40 PM	**Informed Consent** Matthew Lahaie, MD, JD
4:40 – 5:00 PM	**Treatment Refusal, Guardianships, and Advance Directives** Rebecca Brendel, MD, JD
5:00 – 5:20 PM	**Wills & Trusts: Testamentary Capacity** Judith Edersheim, JD, MD
5:20 – 5:45 PM	**Panel discussion** Rebecca Brendel, MD, JD, Judith Edersheim, JD, MD, Matthew Lahaie, MD, JD
5:45 PM	**Break**
6:00 – 6:20 PM	**Ethics and Boundary Issues** Rebecca Brendel, MD, JD
6:20 – 6:40 PM	**Confidentiality, Privilege, and HIPAA** Matthew Lahaie, MD, JD
6:40 – 7:00 PM	**Essentials of Malpractice Law and Risk Management** Judith Edersheim, JD, MD
7:00 – 7:20 PM	**When Kids are Involved** Matthew Lahaie, MD, JD
7:20 – 8:00 PM	**Panel discussion** Rebecca Brendel, MD, JD, Judith Edersheim, JD, MD, Matthew Lahaie, MD,JD
8:00 PM	**Adjourn**

FACULTY

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Associate Director, Harvard MGH Forensic Psychiatry Fellowship
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WELCOME AND INTRODUCTION

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Legal & Regulatory Systems for Psychiatrists

Matthew Lahaie, MD, JD

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MASSACHUSETTS GENERAL HOSPITAL
PSYCHIATRY ACADEMY

Introduction to the Legal System & Civil Commitment

Matthew Lahaie, MD, JD
Director, Law & Psychiatry Service
Massachusetts General Hospital
Instructor, Department of Psychiatry
Harvard Medical School

- Thanks to Ronald Schouten, MD, JD, our former course director and architect of this educational program.

My work

- MGH Law & Psychiatry Service
- Forensic Psychiatry Fellowship Program
- Clinical care
  - Outpatient
  - Emergency Department
  - Correctional Setting
    - Adult
    - Youth
  - Forensic State Hospital
- Forensic psychiatry
  - Criminal and Civil Evaluations

Goals for Today's Program

- Explore medicolegal issues that affect our practices in greater depth and breadth than previous program iterations
- Hear from different expert faculty
- Solicit your participation and feedback

An Overview of the Legal System

- Law:
  - A system of regulations utilized to govern the conduct of people of a community, society or nation, in response to the need for regularity, consistency and justice based upon collective human experience (www.law.com Dictionary)
  - Exists as a protector of the status quo
    - E.g. existing rights and principle
  - Exists as a living thing and agent of social change
    - Interpretation of principles with regards to social changes
    - Limitation, or expansion, of existing principles

Legal Precedents

- Case decisions establish legal rules and principles that must be followed in subsequent cases when similar issues are raised (*stare decisis*)
  - Trial court decisions do not stand as precedents
  - Must be an appellate court opinion to be a precedent
  - Precedents only apply within the same jurisdiction

Types of Law

- Criminal law
  - The body of law, embodied in statutes, that relates to offenses against the state and members of the public
  - Penalties can be monetary (fines) or deprivation of or limits on freedom (incarceration, probation)

Types of Law

- Civil law
  - For our purposes, all law that is not criminal, e.g. personal injury or tort law
  - Penalties are monetary (damages) or injunctive (stop doing what you were doing, or start doing something you weren't)
  - Examples of purposes:
    - Tort law (e.g., malpractice): Compensate victims of negligence/discourage negligence
    - Probate law: Give effect to wishes of the deceased; Serve best interests of a child in a custody case
    - Administrative Law: Promulgate rules to regulate areas of practice, such as Department of Mental Health Regulations on seclusion or restraint, or Medical Board on licensing

Civil vs. Criminal

Criminal

- Parties:
  - Prosecutor: burden of proof
  - Defendant
- Determinations:
  - Guilt
  - Sentencing

Civil

- Parties:
  - Plaintiff: burden of proof
  - Defendant
- Determinations:
  - Liability
  - Contributory negligence
  - Damages/Injunctive relief/Change in status

Sources of Law

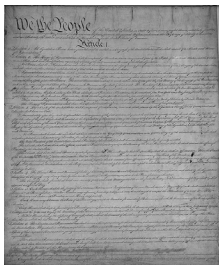
- Common law: Judge-made law
  - English common law originated with Angles, Britons, Saxons, and Normans after 1066
  - Based on custom rather than written codes
  - Application of custom to the facts of a given matter by a court
- Statutes: Written rules enacted by legislativ
- Regulations:
  - Promulgated and enforced by administrative agencies
  - Enforcement decisions reviewable by courts
- Constitutions: A written body of fundamental principles or established precedents for governance

Standards of Proof

- Preponderance of the evidence
  - "More likely than not"
  - >50% or 51% vs. 49%
  - Used in malpractice and other civil matters; lack of competency to stand trial
- Clear and convincing evidence
  - Stronger standard
  - Estimate ~75% certainty
  - Used in fraud, refuting presumption of paternity (by statute in some jurisdictions); typical minimal standard in civil commitment matters
- Beyond a reasonable doubt
  - There must be "an abiding conviction, to a moral certainty, of the truth of the charge." Commonwealth v. Webster, 59 Mass. 295, 320 (1850)
  - ~95%
  - Criminal conviction; civil commitment in Massachusetts

The American Legal System

- The U.S. Constitution as the supreme law of the land
- Parallel systems at the federal and state levels
  - 50 state constitutions
  - 50 state legislatures and sets of administrative agencies
  - 50 state court systems



The American Legal System

- Typical court structure (state and federal)
  - Trial courts
    - U.S. District Court
    - Massachusetts Trial Court Department
  - Intermediate appellate courts:
    - U.S. Circuit Court of Appeals
    - Massachusetts Court of Appeals
  - Highest appellate court:
    - United States Supreme Court
    - Massachusetts Supreme Judicial Court

Essential Elements of the Adversarial Process

- Trier of fact (judge or jury)
- Trier of law (judge)
- Decision making through argument
- Attorney professional ethics:
  - Presenting client's case in the most favorable light
  - Zealous representation within the bounds of the law
- Rules of evidence, e.g. attorney-client privilege
- Settlement/plea bargaining

Involuntary Commitment

- Old standard: Need for treatment (*Parens patriae* model)
- "New" standard: Dangerousness (Police Powers model)
  - To self
  - To others
  - Inability to care for self
- Constitutes "a massive curtailment of liberty." (Humphrey v. Cady, 1972)
  - Requires procedural Due Process
    - Clear criteria required
    - Right to counsel, legal representation, present and confront witnesses

Involuntary Commitment

- Two parts
  - Temporary involuntary hospitalization
    - On petition of one or more individuals (clinicians of multiple types, law enforcement)
    - Usually 72 hours, but it varies
      - Missouri: 96 hours
      - Connecticut: up to 10 days
      - "Conditional voluntary" admission
  - Civil commitment:
    - By a judge, in some cases a jury
    - For an extended period, e.g. 6 months/12 months

Civil Commitment: Liability Issues

- False imprisonment
- Libel/slander/defamation
- Violation of civil rights
- Defenses
  - Good faith
  - Statutory immunity
  - No reason to know of violation of civil rights
- Documentation is key

Civil Commitment: Liability Issues

- Constitutional torts: 42 USC §1983
  - Zinermon v. Burch (US 1990)
    - State official may be held liable for civil rights violation where lack of procedural safeguards allowed an incompetent patient to voluntarily commit himself to a state mental hospital
    - Deprivation of liberty without due process
    - Must assess competency of individual offered voluntary admission

Thank You!

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Informed Consent

Matthew Lahaie, MD, JD

Informed Consent

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Director, Law & Psychiatry Service
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Informed Consent

- A **PROCESS** by which one individual agrees to allow another to intrude upon his bodily integrity or other rights where the agreeing party is competent to consent and does so voluntarily and with a reasonable degree of knowledge

Elements of Informed Consent

- Informed
- Voluntary
- Competent

Information

- Professional standard
  - "Reasonable physician"
    - E.g., New York Public Health Laws, Section 2805-d
- Materiality standard, e.g., Massachusetts
  - "Reasonable patient"
  - This patient

Off-Label Use of Medications

- FDA Approval
  - Approval given to marketing information based on research-proven efficacy and safety
  - Not intended to interfere with doctor/patient decisions regarding specific medication
- Physician may prescribe any FDA-approved medication for any purpose, using his/her professional judgment
  - Lack of FDA approval not a material risk
  - Malpractice claims due to negligent professional judgment
  - Protection: documented studies of safe use in the manner chosen and in similar practice

Information: General Requirements

- Nature of condition
- Nature and probability of material risks of Tx
  - E.g., black box warnings, type II diabetes
- Reasonably expected benefits, side effects
- Inability to predict results
- Potential irreversibility of the procedure
- Likely results, risks, and benefits of **no and alternative Txs**

Voluntary

- Free of coercion from the clinician
  - Overt
  - Subtle
- Family pressure or encouragement is acceptable from a legal standpoint
  - Treatment adherence issues
  - Assent vs. consent

Competency

- Basic issue
- Incompetence defined: Incompetence constitutes a status of the individual that is defined by *functional* deficits (due to mental illness, mental retardation, or other mental conditions) judged to be sufficiently great that the person *currently* cannot meet the *demands* of a specific decision-making situation, weighed in light of its potential *consequences.* (Grisso, Appelbaum, 1998.)

Competency

- Assessment (Appelbaum, 2007)
  - Express a preference
  - Factual understanding
  - Appreciation of seriousness of condition and consequences of accepting or refusing
  - Able to manipulate information in a rational fashion

Assessment of Capacity to Consent to Treatment

- Expresses a preference
  - Muteness regarding the treatment decision raises a presumption of incapacity
  - Why mute?
  - Cross cultural issues and the Western concept of autonomy and informed consent
    - Similar principles
    - Different approaches and attitudes, e.g. authority
  - Shifting decisions raise presumption of incapacity

Assessment of Capacity to Consent to Treatment

- Factual understanding
  - Just the basics
  - Affected by clinical conditions: level of alertness, CNS processes, other conditions such as severe pain and mental illness, mental retardation, information processing disorders
  - But also: language, education, cultural, and interpersonal issues

Assessment of Capacity to Consent to Treatment

- Appreciation of the seriousness of the condition and consequences of accepting or refusing treatment
  - Understanding beyond basic facts
  - Ability to weigh relevant factors against each other
  - May be affected by: pain, CNS processes, mental illness, intellectual disability, information processing disorders, personality disorders
    - And also: language, education, cultural, and interpersonal issues

Assessment of Capacity to Consent to Treatment

- Able to manipulate the information in a rational fashion
  - Rationality does not equate with what the treatment team wants
  - The Jehovah's Witness example

How Much Capacity is Enough?

- The sliding scale model (Roth 1977; President's Commission 1982) for level of capacity

Risk/Benefit Ratio of Treatment

Pt's Decision	Favorable	Unfavorable or ?
Consent	Low test for capacity	High test for capacity
Refusal	High test for capacity	Low test for capacity

Common Approaches to Capacity

- Capacity rarely questioned if the decision is in the patient's best interests as viewed by:
  - Treaters
  - Family
  - Others
- Treatment refusal is the most common reason for questioning capacity
- Let the judge take the heat

Common Approaches to Capacity

- Avoid court at all costs
- Preference for battery/malpractice suit over allowing a patient to go untreated

Exceptions to Informed Consent

- Emergency
  - Must assess capacity to consent first
  - Emergency exception does not override treatment refusal by patient capable of giving consent
  - If patient's consent cannot be obtained, emergency physician should seek the consent of family member if time and circumstances permit

Exceptions to Informed Consent

- Incompetence
  - Must assess and document
  - Seek alternative decision maker
- Therapeutic privilege
  - Established in NY by Pub Health §.2805-d
  - "the practitioner, after considering all of the attendant facts and circumstances, used reasonable discretion as to the manner and extent to which such alternatives or risks were disclosed to the patient because he reasonably believed that the manner and extent of such disclosure could reasonably be expected to adversely and substantially affect the patient's condition."

Thank you!

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Treatment Refusal, Guardianships, and Advance Directives

Rebecca Brendel, MD, JD

Treatment Refusal, Guardianships, and Advance Directives

Rebecca Weintraub Brendel MD, JD
Director of Law and Ethics
MGH Center for Law, Brain and Behavior

Introduction

- "Every human being of adult years and sound mind has a right to determine what shall be done with his own body." Justice Cardozo, 1914
- Individuals have:
  - Ethical claims to self-determination and respect
  - Legal entitlements (negative) to be free of unwanted interventions
- Informed consent is the process by which a patient gives permission for care
- Informed refusal is the process by which a patient asserts lack of permission for care
- Capacity is the threshold determination for informed consent
  - Capacity – clinical determination
  - Competency – legal determination

Outline

- Elements of Capacity Assessment
- Clinical Assessment
- Legal Approaches to Lack of Capacity
- Summary

Capacity: Elements

- Express a preference
- Factual understanding
- Appreciation of the seriousness of the condition and consequences of accepting or refusing?
- Able to manipulate the information in a rational fashion?

Appelbaum et. al.; See e.g. NEJM 2007

Outline

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Clinical Reality

- Capacity for **what**?
  - Specific medical decision?
  - Unsafe?
- Capacity rarely questioned if the decision is in the patient's best interests as viewed by:
  - Treaters
  - Family
  - Others
- Treatment refusal over the objection of treatment team or family is a common reason for questioning capacity

Assessment , cont.

- Why does the individual lack capacity?
  - Neurologic/ Psychiatric Status
  - Neurocognitive assessment
- Is the condition reversible?
- What is the anticipated duration of incapacity?

Sliding Scale

- Physicians are often criticized for assessing capacity only for treatment refusal
  - i.e. only when the patient disagrees with the physician or treatment team
- Clinically, physicians approach capacity as a sliding scale involving a risk-benefit analysis
- In general, capacity to refuse a recommended medical intervention is higher risk than to accept

Risk–Benefit Analysis

Refuse Accept	Low Risk	High Risk
Low Benefit	+ +	+ +++++
High Benefit	+++++ +	+++ +++

Outline

- Elements of Capacity Assessment
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Legal Framework

- Adults are presumed competent
  - Includes all activities/ tasks
  - Including medical decisions
- Incompetent (incapacitated) individuals require an alternate decision-maker
  - Capacity: clinical
  - Competent: legal
- Various mechanisms of appointment
  - Advance Directive (HCP)
  - Court appointed (Guardian)
  - Statutes (not in MA)

Mechanics of HCPs

- Since 1990, all 50 US states
- Terminology
  - Principal
  - Agent
  - HCP is the document
- Appointment/ Execution of a HCP
  - Low level of capacity
  - No automatic effect
  - Revocable at any time

HCP Mechanics, cont.

- Invocation
  - Time of future incapacity
  - "Springing clause"
- Revocation
  - At *any* time
  - Disagreement with agent revokes
  - If lack of capacity at time of revocation, may ask for Affirmation or Confirmation

HCP Mechanics, cont.

- Clinically, capacity to designate a SDM is considered a low threshold – low risk
- MA example
  - Revocable at any time
  - "Of sound mind and under no constraint or undue influence"
  - Adult witness (layperson)
  - "sniff test"
- Relevant data
  - Who has helped you in the past?
  - Who do you trust?
  - Why?
  - NOT an understanding of specific treatment needs

SDM Statutes

- Mechanism to identify and legally authorize a SDM where no prior directive exists
- Hierarchy approach
- Limitations
  - Objective rather than subjective
  - Risk of discordance with what the patient would have wanted
- 44 states

Guardianship

- Protective intervention for incapacitated individuals
- Generally a last resort
- Formal legal proceeding
  - vs. clinical capacity determination
  - triggers legal protections
- Cases that do go to court:
  - Treatment refusal
  - Chronic conditions
  - No/ feuding/ unsuitable surrogates
- Clinical and Legal Views of Guardianship

Summary

- Capacity determination
  - Preference
  - Factual Understanding
  - Appreciation
  - Rational Manipulation
- Surrogate Decision Making
  - Health Care Proxy
    - INFORMAL LEGAL MECHANISM
    - Low threshold to execute/ designate
    - Any authority the principal (patient) had when competent
  - Statutes
  - Guardianship
    - Formal mechanism (court required)
    - Burdensome and intrusive – tradeoff for protections

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- Appelbaum PS, Grisso T: Assessing patients' capacities to consent to treatment. *N Engl J Med* 1998; 319: 1635-1638.
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- Brock DW, Wartman SA. When competent patients make irrational choices. *New England Journal of Medicine* 1990; 322(22):1595-1599.
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Additional references upon request

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Wills & Trusts: Testamentary Capacity

Judith Edersheim, JD, MD

Wills and Trusts: Testamentary Capacity and Undue Influence

Judith G. Edersheim, JD, MD
Founding Co-Director: The MGH Center for Law, Brain and Behavior
Assistant Professor of Psychiatry: Harvard Medical School

Testamentary Capacity: The Basics

1. Adults are presumed to have the capacity to undertake legal tasks.
2. The party challenging capacity has the burden of proving incapacity
3. And the standards of such capacity are *transaction specific*
4. For Testamentary Capacity: (see *Banks v. Goodfellow 1870*)
   - At the time of will execution, the testator has the capacity to:
     - Know the meaning of a will
     - Know that a class of individuals are natural heirs (natural objects of ones bounty")
     - Know the extent of one's assets
     - Understand a general plan of distribution to heirs
5. The language varies state to state and cases interpreting standards are also state specific. (see also Model Probate Code)

Testamentary Capacity: The Caveats

Caution:

1. Testamentary capacity is a relatively low bar and differentially applied state to state
2. Capacity need only be present during the execution ("Lucid Interval")
3. General capacity can be negated by an "insane delusion"
4. Courts usually use a sliding scale – complex estates require more capacity than simple ones

Testamentary Capacity: A Cognitive Standard

Understanding a Will:
- Semantic Memory
- Verbal abstraction
- Verbal comprehension

Knowing the Extent of Property (approx value)
- Semantic Memory
- Long term historical memory
- Short Term memory

The objects of one's bounty:
- Autobiographical Memory

An Asset Distribution Plan
- An integration of above cognitive abilities
- Executive functioning to understand prospective plan

(Marson, Huthwaite & Hebert 2004)

Consider Source of Cognitive Compromise

- Neurodegenerative Disorders
- Traumatic Brain Injury
- Severe Psychiatric Disorders
- Neurodevelopmental Disorders (Autism Spectrum Disorder)

The Living Testator: Evaluating Transactional Capacity

Contemporaneous Evaluation of Testamentary Capacity

1. Interview testator's spouse, friends, family for information about daily functioning
2. Obtain legal confirmation about the extent of assets and the planned distribution
3. Perform a comprehensive mental status examination of the testator
4. Perform a clinical interview geared specifically to the evaluation of task specific abilities
5. Consider Financial Capacity Instruments (Marson, Lichtenberg)

(Marson, D.C., Herbert T, Testamentary Capacity, 2008)

The Deceased Testator: Reconstructing a Mental State

1. Know the relevant legal standard in the jurisdiction
2. Understand the legal context, mechanics and sequence of execution
3. Obtain Medical records, including of diverse specialties
4. Explore mental status close to the time of will execution
    1. Seek lay judgments about mental abilities (family, friends, caregivers, other professionals)
    2. Seek information about professional interactions (deposition)
    3. Obtain any formal neuropsychological or psychological testing
5. In the case of a dementia, meticulously chart and stage the diagnosis, stage, treatment interventions, responses. (CDR etc)

(American Bar Association: Assessment of Older Adults with Diminished Capacity, Moye et al 2008)

Undue Influence: The Safety Valve

Restatement of Contracts

"Undue Influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare"

- Subversion of will is the central concept
- Typically based in notions of fraud or duress
- Undue influence can be present even with full cognitive capacity
- However impaired capacity increases the vulnerability to undue influence

Models of Undue Influence

Singer/Nievod Factors:	Blum "IDEAL"	Bernatz: "SCAM"	Brandle/Heiser/Stiegel
1. Isolation 2. Dependency 3. Siege Mentality 4. Sense of Powerlessness 5. Sense of Fear 6. Staying Unaware	1. Isolation 2. Dependency 3. Emotional manipulation 4. Acquiescence 5. Loss	1. Susceptibility 2. Confidential Relationship 3. Active procurement 4. Monetary Loss	1. Isolate from others 2. Create Fear 3. Prey on vulnerabilities 4. Create Dependency 5. Create lack of faith in own abilities 6. Induce shame 7. Perform intermittent acts of kindness 8. Keep unaware

ABA Handbook 2008 Moye et al

Undue Influence: The Database

1. Usually in cases of wills and trusts, but can be applied to financial exploitation in general
2. A highly particularized evaluation with a large data base:
   - Personal, Occupational, Social History (IADL, caregiver accts etc.)
   - All medical records, neuropsychological testing, psychological testing, specialized instruments
   - Financial Data Base: Property, Transfers, Habits and Practices
   - Legal Data Base: Estate Planning Documents, Legal Context of Execution
   - Law Enforcement and Social Service/Agency Interventions
   - Collateral Interviews with spouse, family, staff, informants etc
   - Deposition testimony for unavailable informants

Red Flags Regarding Undue Influence

1. A confidential relationship allowed the influencer to control the testator
2. The influencer was active in the procurement of an asset change
3. The influencer received a significant benefit under the procured change
4. The changes were “unnatural” and inconsistent with the testators prior wishes and values
5. **The testator had underlying vulnerabilities (neurologic disease, substance use disorder, other psychiatric illness)**

Underlying Vulnerabilties

- Medical Vulnerabilities
- Psychological Vulnerabilities
- Social Context Vulnerabilities
- Isolation and Control by the Influencer
- The Distortion of Information by the Influencer

Medical and Psychological Vulnerabilities

Medical

- Cognitive Impairment
- Sensory Deficits (Vision, Hearing)
- Disability or Injury

Psychological

- Depression/Anxiety
- Concerns about declining memory/function
- Difficulty getting social needs met
- Emotional Distress (loss of spouse, disruption)
- Underlying Personality Vulnerability (Dependent, Avoidant)

Social and Contextual Vulnerabilities

Social Context Permits Isolation, Dependence, Manipulation:

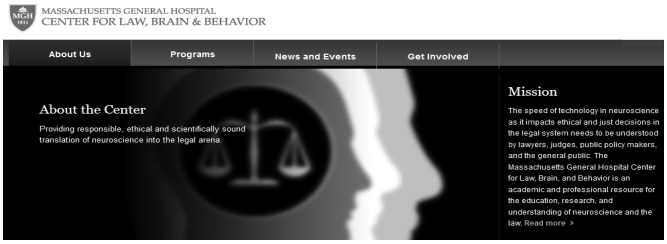
- Trusted others perform multiple roles for the victim
- The victim views the trusted person as irreplaceable and primary
- The trusted person isolates and controls the victim
  - Physical isolation
  - Controlling who visits
  - Controlling information (mail, phone, email)
  - Controlling access by family and friends

Vulnerability to Information Distortion

The trusted person promotes false beliefs about others (family, friends, advisors)

- Encourages suspiciousness or delusions which emerge in the context of memory deficits
- Encourages negative or hostile feelings towards previous beneficiaries or objects of generosity
- Distorts why trusted others are not visiting when they are prohibited from visiting or communicating.

For More Information….



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Ethics and Boundary Issues

Rebecca Brendel, MD, JD

Ethics and Boundary Issues

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Director of Law and Ethics
MGH Center for Law, Brain, and Behavior

Ethics: An Overview

- *Ethics is the study of how to make hard choices in the face of conflicting values.*
  - *Elliott Crigger, Director of Ethics Policy, American Medical Association*
- Two core elements:
  - Identifying values
  - Making choices

Approaches to Values

- What defines or is the origin of good or right?
  - Duty – Deontology
    - Relevance: oaths, covenants, pledges
  - Outcomes – Consequentialism
    - Relevance: public health, benefit, effect size
  - Character – How to be
    - Relevance: Moral exemplars, what would X do
  - Principles and principlism – BALANCING
    - Autonomy
    - Beneficence
    - Nonmaleficence
    - Justice

Selected Contemporary Bioethics Lenses

- Feminine Bioethics and Ethics of Care
  - Caring in all its dimensions as core consideration
- Feminist Bioethics – Ending gender-based oppression
  - Extension to all forms of oppression
  - Gender, sexuality, heteronormativity
  - Disability, vulnerable populations
- Critical Race Theory
  - Identify sources of and end race-based oppression and injustice
  - Intersectionality
  - Structural racism
- Narrative Ethics
  - Individual and shared stories
  - What is right and what to do must be seen in context

Making Choices

- How do we choose between competing or conflicting values?
  - Balancing
  - Moral residue
  - Resources
    - American Psychiatric Association
    - American Academy of Psychiatry and the Law
    - American Medical Association

Boundaries

- Responsibility of the psychiatrist to maintain boundaries for safe and effective treatment
- Boundary Crossings
- Boundary Violations
- Special Considerations:
  - Treatment vs. Evaluation
  - Telemedicine

Summary

- Clinical and forensic practice can lead to ethical challenges
  - Identify the values at stake
  - Make considered choices
    - Also opportunity to identify and advance opportunities for advancing ethical interests
- Boundaries
  - The responsibility of the psychiatrist
  - Challenges nonetheless arise
  - Resources and Strategies
- Questions?

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- Additional references available upon request

NOTES

Confidentiality, Privilege, and HIPAA

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Confidentiality, Privilege, and HIPAA

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Confidentiality

- Professional's duty to keep matters revealed in confidence from third parties

Circle of Knowing Model

- Lawyer
- Police
- Outside MD or Therapist

Patient
Co-treaters
Staff
Consultants
Supervisors
Facility accepting in transfer

- Family
- Former MD or Therapist

Exceptions to Confidentiality

- Emergency
- Waiver
- Incompetence
- Civil commitment
- Statutory reporting requirements
- Statutory exceptions, e.g., imminent risk of harm to the patient (suicide)
- Other legal requirements, e.g., duty to protect third parties

Tarasoff and the Duty to Protect Third Parties

- No common law duty to take action to protect others from harm except where a special relationship exists between the parties.
- Special relationships imposing duty to control the actor
  - Parent and child, doctor and patient, parole officer and parolee
  - Actor must be able, or have right, to control
  - Harm must be foreseeable
- Origins: the duty to disclose infectious diseases:
  - To family members, close contacts
  - To public authorities
- Jurisdictions differ: Duty to protect third parties rejected in FL, IL, NC,TX, VA

Evolving Duties to Third Parties

- The driving cases: liability for failure to warn a patient of side effects that are causally related to an injury to a third party
- Expanded duty: Volk v. DeMeerlerr (Washington, 2016)
  - Treating psychiatrist (Ashby) could be liable for murders/attempted murder committed by patient
  - Special relationship existed that imposed a duty of reasonable care to protect foreseeable victims
  - Forseeability is a question to be answered by the trier of fact

Evolving Duties to Third Parties

- Volk v. DeMeerlerr (cont'd)
  - Patient of 9 years with bipolar disorder/psychosis
    - Long history of suicidal & homicidal/destructive ideation; revenge thoughts and grudges
    - No specific threats to decedent Schiering (his girlfriend) or other victims (her children)
    - Poor compliance
  - Last visit in April 2010; Schiering had moved out
    - Pt reported begin stable but with SI
    - Ashby noted unstable mood
  - Schiering ends relationship on July 16; Ashby not aware
  - Murders/attempted murder of Schiering and sons on July 17

Evolving Duties to Third Parties

- Volk v. DeMeerlerr (cont'd)
  - Summary judgment for defendants based on lack of proof of specific threat and absence of a duty to the third parties
  - Summary judgment reversed, in part, on intermediate appeal
  - Washington Supreme Court
    - Distinction between *medical malpractice* (duty owed to patient) and *medical negligence* (Restatement of Torts §315-duty to third parties arising out of special relationship)
    - Special relationship existed between Ashby and DeMeerleer
    - No duty to control necessary

Privilege

- Patient's right to have matters revealed to a professional held in confidence
- Testimonial privilege
- State and federal
- Exceptions:
  - Same as for confidentiality
  - Dangerous patient exception

HIPAA: Health Insurance Portability and Accountability Act

- Primary purposes
  - Ensure portability of health insurance when changing employers
  - Prevent unauthorized disclosures of medical information
  - Facilitate the exchange of medical information to improve the efficiency of care
- Civil and criminal penalties
- Pre-empted by more protective state law

The HIPAA Bogeyman

- Growing list of litigated cases
- Sets minimum protections; higher protections control
- Only applies to
  - Health Plans
  - Health Care Clearinghouses
  - Health Care Providers Performing Certain Electronic Transactions
    - Claims, enrollment, eligibility
    - Payment, premiums
    - Referrals, certifications, authorizations
- Where state law provides a higher level of privacy protection, it preempts HIPAA

Protected Health Information (PHI) Under the Privacy Rule

- Identifying information
  - Name
  - Address
  - SSN
- Past, present, or future condition
  - Mental
  - Physical
- Services/ treatment provided
- Payment

HIPAA: The End of Civilization as We Know It?

Privacy Rule Allows Disclosure Without Consent for the Public Good (§164.512)

1. Where required by law, e.g. judicial and administrative proceedings, mandated reporting (No Minimum Necessary Req.)
2. To public health authority, e.g. reporting STDs
3. Child abuse and neglect

Disclosure for the Public Good

4. Other victims of abuse, neglect, or domestic violence, where agency is authorized to receive information and
   - Disclosure is required by law, and in accordance with law, or
   - Individual agrees to disclosure, or
   - Disclosure expressly authorized by statute/regulation and
     - The practitioner "in the exercise of clinical judgment" believes the disclosure is necessary to prevent serious harm to the individual or other potential victims, or
     - If individual is unable to agree because of incapacity, LE or other official represents that the info is not intended for use against the individual and failure to release would materially and adversely affect and immediate enforcement action

Disclosure for the Public Good

5. FDA reporting of adverse events, etc.
6. Report communicable disease to a person who may have been exposed, so long as authorized by other law

Disclosure for the Public Good

7. Employee Workplace Surveillance: may report PHI to employer if:
   - Physician is member of workforce or provides care (evaluation?) at the request of employer for medical surveillance or to evaluate for a work-related illness or injury; and
   - PHI consists of findings of work-related injury or illness; and
   - Employer needs the findings to comply with obligations under federal or state law (OSHA, Mine Safety); and
   - MD provides written notice to individual that it is disclosed to employer

Disclosure for the Public Good

8. Health Oversight Activities
   - E.g., audits, civil and criminal investigations
   - Not if the individual is subject of investigation, except if investigation relates to receipt of health care, claim for public benefit, qualification or receipt of public benefits, such as disability

Disclosure for the Public Good

9. Judicial and Administrative Proceedings
   - Court order
   - Subpoena or discovery request if
     - Requestor offers written statement with documentation that
       - There has been a good faith attempt to provide written notice to individual, and
       - Time to raise objections has lapsed and no objections filed
     - Qualified protective order
     - Provider notifies individual or seeks protective order

Disclosure for the Public Good

10. Law Enforcement
    - Required by law, e.g. gunshot, other injury
    - Warrant or process
    - Administrative request for law enforcement
    - Limited information for identification and location purposes, e.g. locating suspect, ID body
    - Victims of crime, e.g. rape kit, if individual cannot consent
    - Suspicious death
    - Crime on premises of the practice
    - Reporting crime in emergencies if necessary to alert LE to
      - Commission and nature of the crime,
      - Location of crime or victims, and
      - Identity, description, and location of perpetrator

Disclosure for the Public Good

11. Coroners and Funeral Directors
12. Cadaveric Organ, Eye, Tissue Donation
13. Research

Disclosure for the Public Good

14. Avert Serious & Imminent Health/Safety Threat
    - May disclose or use PHI, consistent with applicable law and ethical standards, if good faith belief that it is necessary
      - To prevent or lessen serious and imminent threat to health or safety of a person or the public and disclosure is to a person/entity reasonably able to prevent or lessen the threat, including the target; or
      - For LE to identify or apprehend an individual (i) who escaped from lawful custody or (ii) statement by individual admitting participation in a violent crime reasonably believed to have caused serious harm to the victim
    - Good faith of such disclosure is presumed

Disclosure for the Public Good

15. Specialized Government Functions
    - Military & veterans' affairs
    - Separation and discharge from the military
    - National security and intelligence activities
    - Protective service for USSS protectees
    - State Department medical suitability determination
    - Medical care of inmates
    - Government programs providing public benefits, if expressly required or authorized by statute or regulation
16. Compliance with Workers' Compensation Programs

HIPAA Violation Penalties

- No private cause of action (but might support other private action, including in state court)
- Enforcement by DHHS Office of Civil Rights
- Penalties
  - Civil (42 U.S.C. §1320d-5)
    - $100/violation; maximum $25,000 annually
    - No penalty if: punished criminally, lack of knowledge or reasonable diligence, result of reasonable cause rather than willful neglect and action taken within 30 days

HIPAA Violation Penalties

- Criminal penalties (42 U.S.C. §1320d-6)
  - Criminal Knowing violation by disclosure of PHI
    - Fine not more than $50,000, imprisonment not more than 1 year, or both.
    - If committed under false pretenses, fine of not more than $100,000, imprisonment for not more than 5 years, or both.
    - If with intent to sell, transfer, or use for commercial advantage, personal gain, or malicious harm: fine of not more than $250,000, imprisonment for not more than 10 years, or both.
- Implications for clinicians: beware what you do with your video and audio tapes.

State Statutes and Common Law

- Pettus v. Cole (57 Cal. Rptr.2d 46 (Cal.App. 1, 1996))
  - Employee sued employer and two psychiatrists who had examined employee re disability leave
  - Alleged:
    - Unauthorized release of medical information in violation of Confidentiality of Medical Information Act (CMIA)
    - Invasion of constitutional right of privacy
    - Breach of contract
    - Wrongful termination in violation of public policy
    - Unauthorized use of medical information

Pettus v. Cole (cont'd)

- Psychiatrists violated Confidentiality of Medical Information Act by giving employer (including supervisor) a detailed report of the psychiatric evaluation of an employee without the employee's specific written authorization

Pettus v. Cole (cont'd)

- Employee raised a triable issue re violation of his right to privacy under the California Constitution by MDs
- Employer violated both the CMIA and the employee's state constitutional rights to autonomy & privacy when it terminated his employment because of his refusal to comply with its demand that he enter an inpatient alcohol treatment program

So What Do We Do?

- HIPAA as setting minimal requirements
- Extension and acknowledgment of HIPAA standards likely
- Pay attention to jurisdictional requirements
- Prior to evaluating individuals
  - Know who will receive the report and adjust content accordingly
  - Oral warning and consent
  - Written permission to release report
  - Limit release of information on a "need to know" basis

Thank you!

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NOTES

Essentials of Malpractice Law and Risk Management

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The Essentials of Malpractice Law and Risk Management

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Assistant Professor of Psychiatry, Harvard Medical School

Goals

- Explain the Standard of Care required for the practice of psychiatry
- Present the common practice pitfalls which expose practitioners to increased risk and potential liability
  - Failure to properly diagnose and treat
  - Failure to maintain confidentiality
  - Failure to obtain informed consent

The Frame: Legal Risk

Discuss Today:

- Negligence Law
- Malpractice Risk in Psychiatry

Discuss Someday:

- Constitutional Law Violations
- Administrative Board Sanctions
- Criminal Charges

Psychiatric Malpractice: The Odds

How often are Physicians Sued (1991-2005)?
- Annually 7.4% of all physicians face a malpractice claim

Ranked By Specialty (NEJM 2011)

• Neurosurgery	19.1%
• Cardiothoracic Surgery	18.9%
• General Surgery	15.3%
• Family Medicine	5.2%
• Pediatrics	3.1%
• Psychiatry	2.6%

What are the Outcomes? 78% of claims result in no payments.

Psychiatric Malpractice Suits by Type of Claim

1. Suicide
2. Boundary Violations
3. Split Treatment Dislocations
4. Unavailability/Abandonment
5. Failure to Protect Third Parties
6. Mismanagement of Medications
7. Failure to Obtain Informed Consent

What is Malpractice?

Where does Malpractice sit in the legal landscape:

1. A “tort” or non-criminal harm
2. Within torts, a “negligent tort”
3. Within negligent torts, a. negligent tort committed by a professional.

The 4 D's

What must a plaintiff in a malpractice action assert to have a valid claim?

Duty

Dereliction

Directly

Damages

#1 : Duty

The plaintiff must show that he or she was you patient….that a duty of care existed.

- When is this in dispute?
  - Curbside Consultations
  - Supervision of Residents
  - Consultation to Teams
  - Good Samaritan Contexts

#2 Dereliction

A Professional Negligence Tort means that a professional failed to live up to the "Standard of Care"

"Psychiatrists have the duty to possess that degree of skill and learning ordinarily possessed and used by members of the profession in good standing, and who are engaged in the prescribing, dispensing and administering of medications in the same or similar circumstances."

#2 Dereliction continued

What lives up to the standard of care?

1. Reasonable care, not extraordinary or perfect care
2. Based on the sub-specialty which you purport to offer
3. Proved by a preponderance of the evidence

#3 Directly

Directly captures the concept of direct legal causation.

- But for link between physician conduct and bad outcome
- Proximate or legal cause
- Without intervening acts or omissions

#4 Damages

The dereliction of your professional duty must have directly caused Damages:

1. Measureable physical damage
2. Measureable psychological damage
3. Measurable social/occupational/reputational damage

Dereliction: Breaching the Standard of Care:

The Duty to Treat Properly:
- Negligent Diagnosis
  - **Suicidality**
  - Homicidality
  - Treatable Conditions
- Generally Negligent or Poor Care
  - Failure to offer indicated medications
  - Failure to treat with adequate doses
  - Failure to hospitalize when indicated
- Failure to Report Abuse or Neglect
- Failure to Protect Third Parties
- Failure to Provide Coverage/Abandonment

Suicidality

Liability for Suicidal Acts
- Failure to offer proper treatment
- Failure to offer appropriate safety
- Where should you turn?
  - Professional Practice Guidelines
  - Hospital Risk Management Guidelines
  - Authoritative Texts

Dereliction: Breaching the Standard of Care:

Negligent Use of Somatic Treatments

- Poor Record Keeping
- Fragmented Care
- Failure to Monitor Side Effects
- Disregard of Treatment Guidelines

Failure to Maintain Boundaries

- Models of Boundary Violations
- A well known progression with disastrous results:
  - Erosion of therapist neutrality
  - Therapy as a social hour
  - The patient is treated as special
  - The therapist talks about other patients
  - The therapist talks about herself
  - Extra-therapeutic contact
  - Extended therapy sessions
  - Evening therapy sessions
  - Therapist stops billing
  - Therapist patient romantic/sexual contact

The Legal Consequences of Boundary Violations

Civil Law Suits
- Negligence
- Intentional Torts
- Loss of Consortium

Breach of Contract

Ethical Sanctions

Loss of License

Criminal Charges

Breach of Confidentiality

"You must keep confidential the communications of your patients made in the course of treatment"

Says Who?
- State Common Law
- State Statutes
- Federal Law
- Ethical Principles

Exceptions Include

1. The Duty to Protect (Tarasoff)
2. Commitment/Emergency
3. Mandatory Reporting Statutes
4. Sex Offender Registries
5. Information to Third Party Payers
6. Information to State Agencies
7. Litigation Raising Mental State

Who Can You Tell?

Paul Appelbaum and the Circle of Knowing

Inside	Outside
The Patient	Attorneys
The Treatment Team	Referring Therapists
Some Consultants	Previous Treaters
Nursing / Caregivers	Emancipated Minor Parents
Custodial Parents	Police
Guardians	

Breach of the Duty to Obtain Informed Consent

"*Patients have the right to full disclosure concerning a proposed treatment, including a description of risks and benefits of the treatment, side effects and sequelae, and alternative treatments*"

What Makes Consent Informed?

The Three Elements of Informed Consent

1. KNOWING
2. VOLUNTARY
3. INTELLIGENT

The Three Elements of Informed Consent: *Knowing*

Knowing: What Does That Mean?

A Materiality Standard

What a reasonable patient would need to know to make the decision

- Diagnosis
- Specifics of Treatment
- Consequences with/without treatment
- Alternative Treatment Modalities

Three Elements of Informed Consent: *Voluntary*

Voluntary: What Does That Mean?

The treatment decision was made by the patient voluntarily without coercion

- No physician coercion
- No environmental coercion
- Family persuasion is not usually your problem with caveats

Three Elements of Informed Consent: *Intelligent*

Intelligent: What Does That Mean?

A decision must be made intelligently or competently:

- The ability to **express** a choice
- The ability to **understand** presented information
- The ability to **appreciate** the significance
- The ability to **reason logically** about rx options

Failures of Documentation:

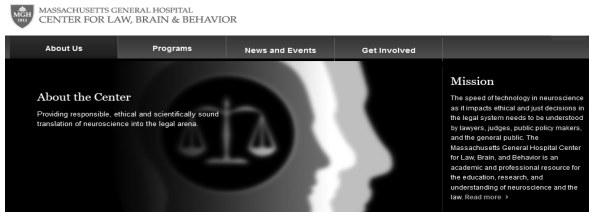
The Most Common Pitfalls

1. If you didn't write it down, it didn't happen
2. What should you document?
    1. *The service provided, when and by whom*
    2. *The informed consent process*
    3. *Your own reasoning about the decision*
    4. *Whom you consulted and who approved*
3. Never ever change a record.

The Bottom Line:

The best way to avoid liability is to practice up to the highest standards, obtain consultation where indicated, document process and reasoning, and maintain respectful boundaries and patient confidentiality.

For More Information….



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When Kids are Involved

Matthew Lahaie, MD, JD

When Kids Are Involved: Selected Legal & Risk Management Issues

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Agenda

- Custody & Divorce
- Informed Consent
- Confidentiality
- Off-Label Treatment
- Mandatory Reporting

Custody & Divorce

Determining Paternity

- When married parents have a child, parentage is presumed
- When parents are not married, only mother's parentage is established by birth of child
  - Typically, paternity established through:
    - Voluntary agreement by mother/father of child, or
    - By court order with finding of paternity

Physical Custody

- Physical custody:
  - Role & responsibility of providing day-to-day care
- Primary Physical Custodian:
  - Individual providing majority of day-to-day care
- Parenting Plan:
  - Court-ordered division of physical custody between custodians

Legal Custody

- Legal custody:
  - Authority to make major life decisions for child
    - Healthcare, education, religious upbringing, etc.
- Legal custody typically is binary
  - You have it or you don't
- When parenting capacity a concern, a court may alter or sever legal custody

Other Custody Forms

- Guardianship:
  - Judicially appointed individuals with various arrangements of physical and legal custody of children
  - State Custody (Child Welfare/Foster Care/ Correctional)
- Emancipated Minor:
  - Judicial act to free a minor from control of parents, and parents freed from responsibility for child
- Mature Minor:
  - A minor may possess the maturity to choose or reject a particular health care treatment and in their best interest to not involve parent/guardian as typical

Treating Kids of Divorced Parents (I)

- Divorce almost always alters physical custody, and may alter legal custody
  - Typically, parents share both physical and legal custody
- Working with divorced parents sharing legal custody is analogous to working with married parents
  - Parents are expected to collaborate in decisions

Treating Kids of Divorced Parents (II)

- Recommend at a minimum 'other' parent assents to treatment of child
- In emergencies or critically acute situations, one parent's consent is sufficient
- Where parents sharing legal custody disagree about treatment, your role is to not negotiate their discord

Considerations in High Conflict Divorce

- ~10% of all divorces are high conflict (involve extension litigation)
- Children's treatment often a nexus of conflict
- Maintain your focus on need of patient
- Risks:
  - Being enlisted as partisan
  - Being misperceived or misrepresented

Maintain your Neutrality

- Ensure both parents have equal access to you
- Provide both parents with same timely information
- Unless acting in formal forensic capacity, do not:
  - Critique parent's behavior/decision-making,
  - Critique parenting plans,
  - Offer opinions regarding parenting capacity

Considerations for Informed Consent

Considerations for Informed Consent

- Minors are presumed incapable of informed consent
  - Important to obtain assent (expression of willingness or agreement) of child if developmentally appropriate
- Aim to balance the perspectives, autonomy, and wishes of the parent, child, and the clinician

Are the parents competent?

- Parents assumed competent to make treatment decisions regarding their children
- However, could be incompetent
  - Incompetent: Status of an individual defined by functional deficits (due to mental illness, mental retardation, or other mental conditions) judged to be sufficiently great that the person cannot meet the demands of a specific decision-making situation at the time, weighed in light of its potential consequences

Exceptions to Presumption of Incompetence in Kids

- Emergency
- Mature Minor
- Statutory exceptions:
  - STD, HIV, family planning/reproductive health, mental health treatment, or substance abuse treatment
- Judicial bypass in minor seeking abortion

Considerations for Confidentiality

Considerations for Confidentiality

- Those with the legal authority to consent to treatment have the legal authority to access all the information disclosed in treatment and to the pertinent medical records

Balancing Spheres of Privacy

- At the outset of treatment, delineate with the adolescent and the parents the expectations around disclosure of information
- Treaters should encourage developmentally appropriate fostering of adolescents' growing independence
  - Encourage parents to do the same

Disclose Information Relevant to Wellbeing

- Never withhold information from parents that may help protect patient from serious harm
- Considerations:
  - Legal and ethical obligations to disclose,
  - Potential value of parents being aware,
  - Impact of disclosure on treatment
- Strategize and collaborate with patient on how best to disclose

Exceptions to Maintaining Confidentiality in Kids

- Mandated reporting of abuse and neglect
- Emergency
- Safety of patient/others
- Malpractice suits
- Civil commitment
- HIPAA Exceptions
- Judicial waiver of privilege

Off-Label Use of Medications

Federal Drug Administration Approval of Medications

- Approval given to marketing information based on research-proven efficacy and safety
- Not intended to interfere with doctor/patient decisions regarding use of medication
- Many, many psychiatry medications are used off label in child psychiatry

Physician Uses Professional Judgment

- Lack of FDA approval is not a material risk.
  - Rather, lacking use of professional judgment/standard of care provides basis for malpractice claim
- Best Protection = studies of safe use + community practice
  - For guidance, look to literature, guidelines, and peer practice
- Black Box Warnings:
  - Pay attention to them
  - Include in informed consent

Mandatory Reporting

Mandatory Reporting

- Typical obligation to report of abuse and neglect of child (or vulnerable person) to State Child Welfare Agency
  - If, in your professional capacity, you have reasonable cause to believe is being physically, emotionally, or sexually abused or is being neglected

Thank you for your attention!

Outline

- Custody & Divorce
- Informed Consent
- Confidentiality
- Treating Off-Label
- Mandatory reporting

NOTES

Panel Discussion

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